Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN E. SULLIVAN and A. CORINNE SULLIVAN,
Petitioners,

v.

THE CITY OF MEMPHIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 36(a) sets forth the procedure whereby parties may secure pre-trial admissions to facts and the application of the law to facts. Subsection (b) provides that "any matter admitted under this rule is conclusively established. . . ." In this 42 U.S.C. § 1983 action, respondent admitted, pursuant to the rule, that petitioners owned an easement in the segment of the street leading from their home to a highway that was permanently closed by a City resolution so that a church could develop the street into an addition to its parking lot. On appeal, the Sixth Circuit found, directly contrary to the Rule 36 admission, that petitioners did not have a property interest in the segment of the street closed by the resolution, and, therefore, they lacked standing to challenge the constitutionality of the resolution.

The Question Presented is:

Is a federal court of appeals free in a Section 1983 action to ignore the "conclusive[]" effect of one party's Rule 36(a) admission and decide the case directly contrary to such admission?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Petitioners, John E. Sullivan and A. Corinne Sullivan, were plaintiffs-appellants below; respondent, the City of Memphis, was defendant-appellee.

Pursuant to S.Ct. Rule 29.1, petitioners note that the City of Memphis is a duly chartered municipal corporation pursuant to the laws of the State of Tennessee.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners John E. Sullivan and A. Corinne Sullivan respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on January 6, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished and is reprinted in the appendix hereto ("App.") at 1a. The order of the United States District Court for the Western District of Tennessee is unpublished and is reprinted at App. 11a.

JURISDICTION

Petitioners sought declaratory and injunctive relief under 42 U.S.C. § 1983 against respondent, the City of Memphis, in the United States District Court for the Western District of Tennessee on December 14, 1989. Jurisdiction was based on 28 U.S.C. § 1331. The parties filed a Stipulation of Facts and also stipulated that the district court could resolve the issues between them on the record without the necessity of a trial. On November 2, 1993 the district court dismissed petitioners' complaint. App. 11a.

Petitioners filed a notice of appeal on November 5, 1993, and the Court of Appeals affirmed on January 6, 1995. App. 1a. A timely-filed petition for rehearing was denied on February 8, 1995. App. 10a.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 36 provides in pertinent part:

> (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

STATEMENT

Over forty years ago petitioners purchased a home on South Evergreen Street in Memphis, Tennessee. They received a warranty deed conveying to them a fee simple interest in the property. In the deed, their lot was described by reference to a recorded subdivision plat, wherein South Evergreen Street was laid out and bounded their lot.

Because of this plat and the fact that South Evergreen Street provided direct and convenient access to Union

Avenue, a six-lane, 80-foot-wide highway (*see* App. 2a) that constituted a major thoroughfare in the City, petitioners acquired an irrevocable private road easement, of necessity and convenience, in the street as well as an easement of access over the street to their home.

On December 12, 1989 the Council of the City of Memphis passed a resolution closing the portion of South Evergreen Street between petitioners' home and Union Avenue. Petitioners' home abuts the street and is immediately adjacent to the closed segment, which provides the only direct and convenient access to Union Avenue.

The resolution purported to convey the City's interest in the street to Idlewild Presbyterian Church upon condition, *inter alia,* that the church construct curbs and sidewalks across the closures, thereby permanently obstructing its use as a street.[1] The church wanted the street closed to expand its parking lot located on one side of the street and to make the parking lot "contiguous" to its buildings located on the other side of the street.

Petitioners filed suit against respondent challenging the constitutionality of the resolution. They contended that execution of the resolution required respondent to condemn their private road easement in the street and expend public funds to compensate petitioners for the taking of their property. Respondent would therefore be providing direct financial aid to the church in violation of the First Amendment's Establishment Clause. In addition, the Fifth Amendment's Taking Clause would also be violated, since there was no "public use" for the taking of petitioners' property. Petitioners sought a permanent

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[1] The resolution erroneously stated that respondent was the owner of a parcel of land known as South Evergreen Street. Respondent has conceded, and the court of appeals recognized (App. 3a), that respondent did not own the street and possessed no transferable interest in the street.

injunction prohibiting respondent from executing the resolution.

Respondent admitted, in accordance with Federal Rule of Civil Procedure 36(a), that petitioners owned an easement in the very segment of the street closed by the resolution.

> *REQUEST FOR ADMISSION NO. 1:* Please admit that plaintiffs John E. Sullivan and A. Corinne Sullivan own an easement in that portion of South Evergreen designated to be closed by the Memphis City Council's Resolution.
>
> *ANSWER TO REQUEST FOR ADMISSION:* Admitted.

In addition, respondent in its answer to an interrogatory stated, "[respondent does] not deny that [petitioners] have an easement in that portion of South Evergreen Street designated to be closed, but submit that said easement is always subject to the eminent domain powers of the sovereign."

Moreover, respondent in a written memorandum to the district court stated, "[respondent] has never denied that [petitioners] have a right-of-way over that portion of South Evergreen Street to be closed. *Jacoway v. Palmer*, 753 S.W.2d 675 (Tenn. App. 1987) [appeal denied (1988)]." [2]

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[2] In *Jacoway v. Palmer*, 753 S.W.2d at 677, the Tennessee Court of Appeals stated;

> We believe the law is well established that when land is sold by reference to a plat upon which several streets and avenues are laid out, the grantee acquires an easement in the street or way upon which his lot is situated and in such other streets or ways as are necessary or convenient to enable him to reach a highway. . . . Each landowner who purchases under such a recorded plat is entitled to a private road easement over the lands shown as roads on the plat to their termines with public

The district court recognized that respondent had "conceded" petitioners' "private easement" in the closed segment of the street (App. 14a).[3] The court further assumed that the City's resolution operated to impair petitioners' easement (App. 15a), but held on the merits that there was no First Amendment violation because the underlying purpose of the resolution was secular, and no Fifth or Fourteenth Amendment violation because any taking was for a "public use." The court therefore denied an injunction (App. 27a).

On appeal, the Sixth Circuit affirmed, but on a different ground. It found that petitioners' easement did not extend over the closed segment of the street and that they therefore "do not have standing to contest any regulation passed by the City affecting the fee owner . . ." (App. 8a).

REASONS FOR GRANTING THE PETITION

The City's admission of petitioners' easement over the precise segment of the street closed by the City's resolution was specifically and repeatedly called to the attention of the court of appeals.[4] The court, however, ignored it and instead found no enforceable easement and no standing.

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roads. Such easement is not one of necessity, but is one of convenience for which he and each adjoining owner paid.

The *Jacoway* court reiterated Tennessee precedent that an abutting lot owner's easement of access and private road easement continue to exist over the road even after the road is closed or abandoned by a public authority. *Id.* at 678.

[3] The court also noted that the installation of curbs, gutters and sidewalks across the closure "may well constitute an interference with or taking of [petitioners'] right to use that closed portion as a vehicular right-of-way pursuant to the easement which these parties have recognized" (App. 15a).

[4] Brief of Appellants John E. Sullivan and A. Corinne Sullivan, 6th Cir., at 7, 10-11, 12, 13; Reply Brief at 1, 2-3.

The Sixth Circuit called petitioners' easement a "private" one in which they enjoyed no "property interest that will be impaired by the closure" (App. 5a). That is, since petitioners could *reach* Union Avenue by alternative, indirect means, their "easement rights do not extend to the portion of South Evergreen in question . . ." (App. 8a).

But that is precisely the opposite of what the City conceded in its admissions.[5] The City obviously was not admitting to an unenforceable, meaningless "easement" when it responded to petitioners' request, nor was it referring to an easement over some other portion of South Evergreen. Such admissions would have been foreign to the case. Instead, the City conceded an easement over "that portion of South Evergreen designated to be closed," and it made that concession in the context of a lawsuit challenging the constitutionality of the closure.

The Sixth Circuit's decision therefore not only conflicts with the plain meaning of Rule 36(b) and the rules of statutory construction established by this Court, *e.g., United States v. Ron Pair,* 489 U.S. 235, 242 (1989), but also creates a direct conflict with the decisions of the Third, Fifth, Seventh and District of Columbia Circuits on the binding and conclusive effect that must be given to Rule 36 admissions.

The consequence of the Sixth Circuit's refusal to give conclusive effect to such admissions will defeat uniform application of the federal rules and leave litigants guessing as to which admissions will be given "conclusive effect" and which will be ignored by the district courts or courts of appeals. The lack of any standard in the Sixth Circuit's refusal to give conclusive effect to a Rule 36 admission results in the purpose of the rule being defeated.

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[5] The word "admissions" is used in the plural even though there was only one Rule 36 admission because, as noted above, the City made the same concession in an answer to an interrogatory and in a written memorandum to the district court.

> Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. [Advisory Committee Notes to the 1970 Amendment to Rule 36.]

By ignoring respondents' admissions and then making a finding in direct contradiction to those admissions, the Sixth Circuit has made all admissions in any case vulnerable to being rendered meaningless at any stage of the proceedings—without notice to the party securing the admission and without affording that party an opportunity to present proof on the matter admitted, but not given conclusive effect by the court.[6] The binding and conclusive effect required by Rule 36(b) to be given to admissions should not be the subject of conflicts among the circuit courts of appeals.

I. LACK OF UNIFORMITY ON THE EFECT GIVEN TO ADMISSIONS IS AN ISSUE OF FUNDAMENTAL IMPORTANCE IN FEDERAL PROCEDURAL LAW THAT WILL BROADLY AND ADVERSELY IMPACT LITIGANTS.

The construction of the Federal Rules of Civil Procedure to assure uniformity of decisions among the courts of appeals is one of the primary purposes of this Court's certiorari jurisdiction. *Acosta v. Louisiana Department of Health and Human Resources,* 478 U.S. 251, 253 (1986); *Schlagenhauf v. Holder,* 379 U.S. 104, 109

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[6] Although the Sixth Circuit's opinion is unpublished, that fact should not carry any weight in this Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy,* 484 U.S. 3, 7 (1987): "[t]he Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *See also, e.g., United States v. Edge Broadcasting,* 113 S. Ct. 2696 (1993); *Spectrum Sports v. McQuillan,* 113 S. Ct. 884 (1993); *Rose v. Clark,* 478 U.S. 570 (1986).

(1964); *Hickman v. Taylor,* 329 U.S. 495, 500 (1947). In fact, there is perhaps no area of federal law in which the need for uniformity is as important as in the rules governing procedure in the thousands of suits filed in federal court each year. The Federal Rules themselves were intended to " 'bring about uniformity' " in the conduct of federal litigation, S. Rep. No. 1049, 73d Cong., 2d Sess. (1934) (quoting letter from Attorney General Homer Cummings), and that critical objective cannot be attained in the absence of resolution by this Court of conflicts that arise in the interpretation of the Rules.

The issue involved in this case presents a square conflict between the Sixth Circuit and the plain meaning of Rule 36(b). In *Ron Pair,* 489 U.S. at 242, this Court stated, "[t]he plain meaning of legislation should be conclusive. . . ." This case involves an important issue *fundamental* to the Federal Rules of Civil Procedure that can arise in virtually every civil case in the federal system when admissions are used to narrow the issues for trial or even eliminate altogether the need for a trial.

The Sixth Circuit's decision will have an enormous impact on litigants who in good faith secure pre-trial admissions to reduce trial time, only to be prejudicially surprised when those admissions are nullified by a court *sua sponte* during trial, post trial, or on appeal without warning or an opportunity to present proof on the undone admission. The salutary purpose of the rule—to reduce trial time—is defeated by a court's refusal to give conclusive effect to the admission.

As the Notes of the Advisory Committee on Rules (1970 Amendments) explained, "[u]nless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated."

The language of Rule 36(b) is a model of clarity. "Any matter admitted under this rule is conclusively es-

tablished unless the court on motion permits withdrawal or amendment of the admission." [7] The Third Circuit has held that Rule 36(b) means exactly what it states; Rule 36 admissions are "unassailable" and "conclusive" for the purposes of the litigation. *Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund,* 850 F.2d 1028, 1037 (3d Cir. 1988); *Anchorage Associates v. Virgin Islands Board of Tax Review,* 922 F.2d 168, 176 n.7 (3d Cir. 1990); *Langer v. Monarch Life Ins. Co.,* 966 F.2d 786, 803-804 (3d Cir. 1992).

The Fifth Circuit has similarly held that an unwithdrawn admission must be given "conclusive effect", as required by the Rule. *Hulsey v. Texas,* 929 F.2d 168, 171 (5th Cir. 1991). In fact, in *American Automobile Association v. AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F.2d 1117, 1119-20 (5th Cir. 1991), the Fifth Circuit found prejudicial error when the district court, after a trial, *sua sponte* withdrew one admission and simply "ignored" others, even though no motion for withdrawal or amendment was ever made under the Rule.

> The very purpose of Rule 36 . . . is to obviate the need to present evidence on a matter that has been admitted. Because the [defendant] never moved for withdrawal or amendment of its admissions, [plaintiff] received no notice that such evidence might be required. In a factually analogous case, the District of Columbia Circuit found the district court had correctly refused a motion to withdraw admissions after completion of the hearing, because the relying party would have been "seriously prejudiced". . . . Here, the district court's *sua sponte* refutations of the admissions seriously prejudiced [plaintiff] by foreclosing any opportunity it might have had during the

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[7] Rule 36(b) also provides the means by which a party making an admission may withdraw or amend its admission. However, respondent did not file a motion to withdraw its admission, nor did it ever request that it be relieved from its unqualified admission.

> course of the trial to present its case or to demonstrate prejudice. [*Id.* at 1120-21.]

The case was reversed and remanded to the district court with instructions to give full and conclusive effect to defendant's admissions. *Id.* at 1121.

The District of Columbia Circuit Court of Appeals case referred to in the above quotation was *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981). There, the court of appeals found that the district court erred by refusing to give binding and conclusive effect to unanswered requests for admissions. Although the district court did not grant defendant's post-trial motion to withdraw the admissions because plaintiff would have been seriously prejudiced, some pertinent admissions were simply rejected and not given binding effect. The court of appeals reversed: "[t]he rule is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect." *Id.* at 768.

The Seventh Circuit has also held that Rule 36 admissions—even admissions by default—are binding and conclusive. *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987). The court recognized the harshness of the rule but noted:

> Rule 36 allows parties to narrow the issues to be resolved at trial by effectively identifying and eliminating those matters on which the parties agree. This function would be lost if parties were permitted to contest under Rule 56 a matter concluded under Rule 36 . . . .
>
> We recognize the potential harshness of this result. The failure to respond to admissions can effectively deprive a party of the opportunity to contest the merits of a case. This result, however, is necessary to insure the orderly disposition of cases; parties to a lawsuit must comply with the rules of procedure. In addition, the harshness is tempered by the avail-

> ability of the motion to withdraw admissions, a procedure which the defendants did not employ. [*Id.*]

Simply put, the very purpose of Rule 36 would be negated if a court—including a court of appeals—is allowed *sua sponte*, post trial, to withdraw or ignore admissions. *American Automobile Association*, 930 F.2d at 1121.

The Sixth Circuit's decision not to give conclusive effect to respondent's admissions, and its finding that petitioners did not possess a property interest in the closed segment of the street, were in direct contradiction to the admissions and to the governing Federal Rule.

Because of the conflict of the decision below with the decisions of the Third, Fifth, Seventh and District of Columbia Circuits, the Court should grant certiorari. In light of the clear language and plain meaning of Rule 36(b), and the fact that the other circuits are without question correct in their interpretation of it, the Court may wish to consider summary reversal.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan. 6, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6471

JOHN E. SULLIVAN and A. CORINNE SULLIVAN,
Plaintiffs-Appellants,

v.

CITY OF MEMPHIS,
Defendant-Appellee.

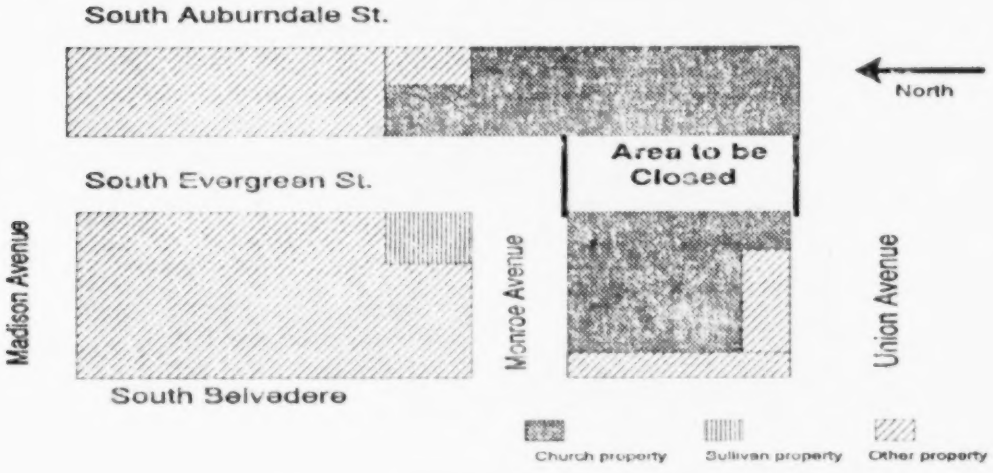
On Appeal from the United States District Court
for the Western District of Tennessee

BEFORE: MARTIN, GUY AND NORRIS, Circuit Judges.

PER CURIAM. Claiming that the City's grant of a church's request to close a portion of a dedicated street violated their First, Fifth and Fourteenth Amendment rights, John and Corrine Sullivan appeal the district court's bench judgment dismissing their 42 U.S.C. §§ 1983 and 1988 claims. For the following reasons, we affirm the district court's decision.

The parties have stipulated to most of the facts in this case. On November 23, 1988, the Idlewild Presbyterian Church applied to the City of Memphis to close a portion of South Evergreen Street. The portion at issue is the

stretch of South Evergreen Street located between Union Avenue and Monroe Avenue. South Evergreen is a minor local street (40′ wide) that connects with Union Avenue, a six-lane highway (80′ wide, a/k/a Highways 64, 70, 79) and Madison Avenue (80′ wide). Below is an accurate depiction of the area involved in this lawsuit:



The streets and lots depicted above are located in a subdivision and are referenced on a plat recorded in 1913. Also in 1913, the City accepted dedication of South Evergreen; the developer, however, did not convey a fee simple interest to the City, as is the usual practice today. The Sullivans own the lot at the northwest corner of the intersection of Monroe Avenue and South Evergreen Street. Idlewild owns property on both sides of South Evergreen Street adjacent to the portion scheduled for closure. The church's parking lot is located on the parcel to the west of South Evergreen, and the church's buildings on the parcel to the east.

In 1988, Idlewild asked the City to close the above-designated segment of South Evergreen Street because it wanted its parking lot and church buildings to be contiguous. Idlewild represented to the City that it wanted closure in order to "expand the education and recrea-

tional facilities . . . [and] scope of services to the community." Idlewild also represented that its facilities and programs, such as Al-Anon, youth and adult basketball, and the civic meetings held there, serve 3,000 participants annually, half of whom are not Idlewild members.

In January 1989, the City's Land Use and Control Board reviewed and rejected Idlewild's application. Idlewild appealed to the City of Memphis Council to review the matter. On December 12, 1989, the Council heard testimony from Idlewild representatives and other individuals supporting closure as well as individuals, such as the Sullivans, who opposed closure. The parties agree that the City has the power to abandon its public easement over the street and close it if "conducive to the public welfare." The Council unanimously approved the closure of the segment of South Evergreen "for public use." The City also resolved to give the closed segment to Idlewild, by quitclaim deed, contingent upon Idlewild, constructing curbs and sidewalks over the closed area. Although the resolution states that the City owns the portion of South Evergreen Street designated for closure, the parties later agreed that the City *does* not own a transferrable property interest in South Evergreen Street. The City has also admitted that the Sullivans, as owners of a lot sold by reference to a recorded plat, own an easement over South Evergreen. The City disputes, however, the nature and scope of the easement. The City argues that the Sullivans have only a reasonable easement to reach a main city thoroughfare or an easement extending to the next intersection. The Sullivans claim that their easement is an irrevocable easement of convenience and necessity in the entire length of South Evergreen Street.

On December 14, 1989, the Sullivans filed a complaint against the City in district court for declaratory and injunctive relief (but not compensation) under 42 U.S.C. §§ 1983 and 1988. In their complaint, the Sullivans

asserted that the City violated the Fifth and Fourteenth Amendments by taking their private property (their easement) for a private use and violated the Establishment Clause of the First Amendment by "transferring" their property to a church for its exclusive use and benefit.

On November 2, 1993, after trial on a stipulated record, the district court issued an order denying the Sullivans' request for an injunction and dismissing the action. Without discussing the scope of any easement that the Sullivans may have in South Evergreen, the district court found, as admitted by the City, that the Sullivans own a private easement in the segment of South Evergreen to be closed. *Jacoway v. Palmer*, 753 S.W.2d 675 (Tenn. Ct. App. 1987). The district court assumed, for trial, that the City had impaired the Sullivans' easement by permitting Idlewild to install curbs across South Evergreen. However, because the Sullivans were not seeking compensation, the court reasoned that the thrust of the Sullivans' complaint was whether the City had a sufficient public purpose for alllowing the closure. The district court then held that the City had a public purpose for closing the street. The court found that, even though the resolution stated that the closure was for an unspecified "public purpose," the record showed that the City closed the segment of South Evergreen for a public purpose—public safety and expansion of community-oriented programs. Because the City may close a street for a public purpose, the court refused to issue injunctive or declaratory relief.

As to the First Amendment issues, the district court stated that the Sullivans misperceived the legal issue by focusing on the fact that Idlewild received a "benefit" rather than on the nature of the benefit received. *Roemer v. Board of Public Works*, 426 U.S. 736, 745-48 (1976). The district court then analyzed the benefit received by Idlewild, the ability to occupy land over which the Sul-

livans have an easement, under *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and found that the City did not violate the Establishment Clause by closing the street. The court also reasoned that even under Justice O'Connor's "endorsement test" or Justice Kennedy's "coercion test," the City's action would be constitutional because the resolution does not endorse religion or Presbyterianism nor does the street closure proselytize or coerce adherence to Presbyterianism or religion in general.

Because this appeal comes to us after a bench trial on a stipulated record, and the issues on appeal concern the district court's determinations of questions of law, we review the district court's decision *de novo, In re Edward M. Johnson & Assocs.,* 845 F.2d 1395, 1398 (6th Cir. 1988), including its determinations regarding state law. *Salve Regina College v. Russell,* 499 U.S. 225, 231 (1991). Further, we must affirm the decision of the district court if it is correct for any reason. *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.,* 772 F.2d 214,, 216 (6th Cir. 1985) (citing *J.E. Riley Investment Co. v. Commissioner,* 311 U.S. 55, 59 (1940)).

Whether the Sullivans' constitutional rights have been violated depends upon whether they enjoyed a property interest that will be impaired by the closure. The Fifth Amendment and Fourteenth Amendments are not violated if the City has not impaired a property right of the Sullivans. The problem we face is whether, under Tennessee law, there are any limitations on the private easement the Sullivans may own over South Evergreen. We turn, therefore, to Tennessee law to ascertain the nature of the Sullivans' easement.

In Tennessee, landowners purchasing property under a recorded plat enjoy a private easement over the streets laid out in the plat. *Wilson v. Acree,* 37 S.W. 90, 91 (Tenn. 1896). This private easement, though, is not without limitation. In *State v. Hamilton,* the Tennessee Supreme Court stated:

> When land is sold by reference to a plan upon which several streets and avenues are laid out, the grantee does not necessarily acquire an easement in all such streets or ways. He acquires an easement in the street or way upon which his lot is situated, and in such other streets or ways as are necessary or convenient to enable him to reach a highway.

70 S.W. 619, 621 (Tenn. 1902).

In *Knierim v. Leatherwood,* the Tennessee Supreme Court stated "our courts have long held that 'persons who buy lots according to plats or plans whereon streets are marked or exist acquire irrevocable rights to such streets.'" 542 S.W.2d 806, 810 (1975) citations omitted). However, the court in *Knierim* also noted a limitation on such easement rights:

> [The] easement is limited to the street or way upon which his lot is situated and in such other streets or ways as are necessary or convenient to his ingress or egress.

Id. at 810 (citing State v. Hamilton, 70 S.W. 619 (Tenn. 1902)).

More recently, the Tennessee Court of Appeals followed *Knierim,* and other Tennessee precedent, in deciding *Jacoway v. Palmer,* 753 S.W.2d 675, 677 (Tenn. App. 1987), *application to appeal denied,* (Tenn. 1988). In *Jacoway,* the court held that subdivision lot owners had an easement of necessity and convenience over a twenty-foot wide strip of land adjacent to their lots to a certain East Brainerd Road to the south. "The plat reveals an easement . . . along the entire eastern portion of the subdivision extending from East Brainerd Road to Friar Road." *Jacoway,* 753 S.W.2d at 676. The court, however, did not hold that the plaintiffs' easement extended northward over the right-of-way to Friar Road. The court of appeals also recognized that the easement was limited "to the street or way upon which his lot is situated and in such other streets or ways as are neces-

sary or convenient to his ingress or egress." *Id.* (citing *State v. Hamilton,* 70 S.W. at 621).

In reviewing Tennessee case law on this issue, we find that the scope of the easement of convenience and necessity is not entirely clear. Tennessee law does not give the Sullivans an easement over every street in the subdivision over which it would be convenient for them to travel. Tennessee recognizes that they have an easement over the street upon which their lot is located, but does not give us guidance as to whether the Sullivans have an easement over the entire street. In *Jacoway,* the court of appeals held that the lot owners had an easement over a platted right-of-way to one public way (East Brainerd Road) but did not mention the other public way (Friar Road).

We believe that Tennessee law gives the Sullivans an easement allowing them ingress and egress to their property. The Sullivans' easement also gives them the right to use such streets as are necessary for them to reach a highway. As for their right to use such streets as are convenient for them to reach a highway, we believe Tennessee law does not give them an easement over every street in the subdivision, or every portion of every street, that would make it convenient for them reach a public highway. We believe the cases show that the easement must give them a *reasonable opportunity* to reach a public way.

Therefore, as shown in the diagram above, and as agreed by the parties, the Sullivans would have two avenues of ingress and egress from their property—the northern part of South Evergreen to Madison and Monroe Avenue to South Belvedere—should the fee owner of the disputed portion of South Evergreen (apparantly Idlewild) choose to obstruct the street. The Sullivans' easement provides them with ingress and egress from their property, and gives them a reasonable opportunity to

reach a public way. We believe, therefore, that under Tennessee law, the Sullivans' easement rights do not extend to the portion of South Evergreen in question and would not be impaired if the fee owner utilizes the property under this portion of South Evergreen.

Because we have determined that the scope of the Sullivans' easement does not extend to the disputed portion of South Evergreen, the Sullivans do not have standing to contest any regulation passed by the City affecting the fee owner (again, apparently Idlewild, though the fee ownership issue was not determined below). Therefore, the legality of that part of the City's resolution requiring Idlewild to build curbs, gutters and a sidewalk in exchange for a quitclaim deed is not properly before this Court. Further, our resolution of the scope of the easement makes it unnecessary for us to address the First Amendment issue.

Based on the foregoing, we affirm the judgment of the district court.

APPENDIX B

Filed: February 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 93-6471

JOHN E. SULLIVAN; A. CORINNE SULLIVAN,
Plaintiffs-Appellants

v.

CITY OF MEMPHIS,
Defendant-Appellee

MANDATE

Pursuant to the court's disposition that was filed 1/6/95 the mandate for this case hereby issues today.

COSTS: NO COSTS

A True Copy.

Filing Fee ..... $
Printing ..... $

Total ..... $

Attest:

/s/ Diane Schnur
Deputy Clerk

APPENDIX C

[Filed Feb. 8, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 93-6471

JOHN E. SULLIVAN; A. CORINNE SULLIVAN,
Plaintiffs-Appellants

v.

CITY OF MEMPHIS,
Defendant-Appellee

ORDER

BEFORE: MARTIN, GUY, NORRIS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

[Filed Nov. 2, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 89-3125-TUA

JOHN E. SULLIVAN and A. CORRINE SULLIVAN,
Plaintiffs,

vs.

THE CITY OF MEMPHIS,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING TRIAL ON STIPULATED RECORD

Plaintiffs John E. and A. Corrine Sullivan have brought this action seeking declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988 against the City of Memphis based upon alleged violations of the First, Fifth, and Fourteenth Amendments. Jurisdiction lies under 28 U.S.C. § 1331.

Both parties filed motions seeking summary judgment, but prior to the court's resolution of the issues raised by the cross motions, the parties filed a Stipulation of Facts in which they stipulated to a number of facts and documents and also included facts that are disputed but which they agree would be offered as testimonial evidence at trial. The parties have stipulated that the court may resolve the issues between them without the necessity of a trial on the basis of their stipulations and the other facts which would have been offered into evidence at trial.

I. Factual Background

Most of the underlying facts are not in dispute. Idlewild Presbyterian Church ("Idlewild") petitioned the Memphis City Council ("City" or "City Council") to close a segment of South Evergreen Street between Union Avenue and Monroe Avenue from public use.[1] Idlewild owns all property on either side of South Evergreen between Union and Monroe up to and including the southern corner of South Evergreen's intersection with Monroe. Closure would convert the "T" shaped intersection of Monroe and South Evergreen into one that is "L" shaped.

The area was originally platted as the Goodwin Place subdivision with streets displayed on the plat recorded at the Shelby County Register's Office in June 1913. Plaintiffs live in a home on a lot located at the Northwest corner of the intersection of South Evergreen and Monroe and its boundaries are described as running to the west line (edge) of Evergreen. The streets contained on the plat were dedicated to the use of the City of Memphis as public roads and Evergreen has been used as a public roadway since 1913; however, the developer never conveyed a fee simple interest to the city and the city has now conceded that it has no transferrable interest in the property underlying the street.

In 1988, Idlewild petitioned the City Council for closure of the street.[2] Idlewild purportedly sought closure

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[1] South Evergreen runs north-south. In their order from north to south, Madison Avenue, Monroe Avenue and Union Avenue all run east-west. Monroe intersects the western side of Evergreen forming a "T" intersection with the top of the "T" running north-south. Exhibit 1 to this opinion is a plat which shows the properties and streets relative to each other.

[2] The parties stipulate that the city may abandon the street according to law, which provides that:

> The said city shall further have authority to close by resolution any street or alley whenever, in the judgment of the board of commissioners, the closing of said street or alley shall

in order to provide greater safety for individuals crossing from the parking lot on one side of the street to the facilities on the other side. The petition reflected that the church sponsors or hosts many community-oriented activities during the week that are open to the general public including day-care, after-chool athletic programs, and non-sectarian organizations such as the Boy Scouts and Alcoholics Anonymous. Expansion of its educational and athletic facilities in recent years has escalated use of the church facilities for such diverse activities.

In January 1989, the Memphis/Shelby County Land Use Control Board ("LUCB") voted to reject the closure petition.[3] The Staff Report to the LUCB stated:

> The applicant has not demonstrated that a compelling interest exists to close the proposed segment of Evergreen Street. Consequently the request cannot be supported. Therefore, until such additional information is provided as called for by the City Engineer's Office and based on the conclusions reached by that office . . ., rejection of the application is recommended.

Idlewild appealed the decision and in December 1989, the City Council held a hearing at which the views of

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be conductive to the public welfare. (Priv. Acts 1913, ch. 163; Priv. Acts 1939, ch. 173, § 2).

(The Board of Commissioners was abolished and the above powers were transferred to the Council of the City of Memphis upon adoption of the Home Rule Amendment to the Charter in 1966.)

[3] Although a transcript of the hearing or determination has not been provided to the court, a staff report prepared for the LUCB meeting and comments made at the City Council meeting in December 1989 indicate that the LUCB's objections related to a lack of documentation as to the safety hazard and the proposed method of closure. The City Engineer determined that closure would impact the traffic flow on Union Avenue and would not comply with the municipal and county ordinances pertaining to the required curve radius and street design.

both sides were presented. The Council passed a unanimous resolution overturning the LUCB recommendation, closing the street to public use, and authorizing the Mayor to execute a quitclaim deed[4] to Idlewild, the owner of the abutting properties. A condition of the Council's action required Idlewild to provide for the construction of curbs, gutters and sidewalks across the closure. The resolution is premised upon the stated fact that the City of Memphis owns the property underlying South Evergreen Street, a fact that the parties to this suit now agree is not accurate. They agree that the City of Memphis had originally obtained the property by dedication and only has an easement for the use of the property as a public road. Neither party has filed a condemnation or inverse condemnation action in any court. Indeed, plaintiffs are careful to point out that they do not seek compensation for a "taking," but an injunction to prohibit the performance of the alleged unconstitutional resolution.

Plaintiffs have asserted this court's jurisdiction based upon alleged constitutional deprivations. To succeed, plaintiffs must prove that (1) they have a protected interest (2) which the City violated and (3) that such alleged deprivation was of a constitutional magnitude.

The defendant has conceded that under Tennessee law plaintiffs have a private easement in that segment of South Evergreen authorized to be closed.[5] *See Jacoway*

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[4] Under Tennessee law a quitclaim deed transfers any right that the grantor may have in the subject property to the grantee whatever that right may be. *See Manhattan Savings Bank & Trust Co. v. Bedford*, 30 S.W.2d 227, 229 (Tenn. 1930) (citing *Campbell v. Home Ice & Coal Co.*, 150 S.W. 427 (Tenn. 1912)); *see also Moore v. Brannan*, 304 S.W.2d 660, 667 (Tenn. Ct. App. 1957); *McQuiddy Printing Co. v. Hirsig*, 134 S.W.2d 197, 204-05 (Tenn. Ct. App. 1939).

[5] *See* Def.'s Answers to Pl.'s First Set of Interrogs. Propounded to Def., City of Memphis, Answer to Interrog. No. 9. It is noted

v. Palmer, 753 S.W.2d 675 (Tenn. Ct. App. 1987) (holding that individuals purchasing lots sold by reference to a recorded plat acquire a private easement of convenience in such streets as are included on the plat). *Id.* at 677 (citing *State ex rel. Beckham v. Taylor*, 64 S.W. 766 (Tenn. 1901)). Under Tennessee law, "[t]he fee that is in the abutting landowner is subject to the easement rights of others." *Id.* The City's resolution to close this portion of South Evergreen itself, however, was nothing more than the exercise of the City's unquestioned state authority to determine which streets will be maintained as public roadways. *State ex rel. Beckham v. Taylor*, 64 S.W. 766 (Tenn. 1901). The fact that the closure of the street and the conveyance of a quitclaim deed are subject to Idlewild providing for the installation of curbs, gutters and sidewalks across the closure may well constitute an interference with or taking of plaintiffs' right to use that closed portion as a vehicular right-of-way pursuant to the easement which these parties have recognized. But it is quite clear from the stipulations of the parties that the city does not own the fee underlying the segment of Evergreen to be closed. It appears that Idlewild, as the abutting owner, may own that fee simple interest. If that ownership is contested by plaintiffs, the issue cannot be determined without the presence of Idlewild as a party. The same is true with respect to the question of whether plaintiffs own an easement that, under Tennessee law, would permit them to utilize the closed segment of Evergreen which is possibly owned in fee by Idlewild. Idlewild thus is an essential party to the resolution of this issue.

Assuming for the purposes of this trial that the City's resolution operated to impair the plaintiffs' easement over Evergreen by authorizing the installation of barriers

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that Idlewild, the intended recipient of the quitclaim deed, is not a party to this suit and has not itself conceded that plaintiffs have a private easement or that it, Idlewild, will not acquire any property rights by virtue of the quitclaim deed from the city.

(sidewalks, curbs and gutters) across the closure and thus deprived plaintiffs of a protected interest, the court reaches the larger issue of whether or not the impairment was one of constitutional magnitude. In their amended complaint, plaintiffs allege the City's actions: (1) violated their First Amendment rights by providing direct financial support to Idlewild, thus respecting an establishment of religion with public funds; and (2) violated their Fifth Amendment rights by taking plaintiffs' private property for a private use. Both allegations are brought against the city through the Fourteenth Amendment.

II. First and Fourteenth Amendment Claims

Plaintiffs assert that the City Council's resolution authorizing the partial closure of South Evergreen constituted direct financial assistance to Idlewild and thus violated the Establishment Clause of the First Amendment.[6] Plaintiffs' assert that the City Council's action in this regard is subject to a compelling interest test as set forth by the Supreme Court in *Larson v. Valente*, 456 U.S. 228 (1982). Using such a test, the plaintiffs contend, the court should "treat the law as suspect and . . . apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. This provision was made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court, however, has *never* stated that there can be no governmental involvement whatsoever where religious

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[6] Plaintiffs seem to assert a policy of per se invalidity. However, inasmuch as religious groups enjoy taxing and zoning advantages similar to those afforded other eleemosynary organizations, the court cannot endorse such a grudging approach. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

matters or groups are concerned. Conversely, the Supreme Court has stated that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone constitutionally invalid." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) (citing numerous cases).

Plaintiffs' action is, in essence, a challenge of the City Council's power to establish, maintain, or, as in this case, to close streets adjoining religious properties where the closure works to the advantage of the church. Such authority is a police power akin to a zoning action.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Supreme Court was confronted with a Massachusetts statute that permitted churches and schools to object to a liquir license application from any establishment within 500 feet of such institution. There, as here, a local ordinance that had an effect upon the use of property but also contained Establishment Clause implications was challenged. The Court stated:

> The zoning function is traditionally a governmental task requiring the "balancing [of] numerous competing considerations," and courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality." . . . Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation.

Id. at 121-22 (citations omitted). The Supreme Court overturned the statute as being an impermissibly broad delegation of legislative power to inter alia, a religious entity. *Id.* at 122.

Plaintiffs' argument suffers from two major infirmities. First, plaintiffs' argument focuses exclusively upon the

fact that a "benefit" has been received by a sectarian organization rather than focusing upon the nature and application of that "benefit." Second, plaintiffs misperceive the nature of the assistance that may be construed as "direct aid" in violation of the Establishment Clause.

Even a cursory review of the legislative enactments and issues involving the Establishing Clause reveals that what has been prohibited is something more than what is indicated by the instant facts. Rather, those enactments that directly contribute to the espousal and teaching of a particular religion or of religion in general are proscribed. In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), the Court summarized the cases discussing whether and what aid may be permissibly extended to a sectarian institution. The Court stated:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, [*see, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104, (1968); *McCollum v. Board of Education*, 333 U.S. 203, 209-212, (1948); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)] but a hermetic separation of the two is an impossibility it has never required. . . .
>
> And religious institutions need not be quarantined from public benefits that are neutrally available to all. The Court has permitted the State to supply transportation for children to and from church-related as well as public schools. *Everson v. Board of Education*, 330 U.S. 1 (1947). It has done the same with respect to secular textbooks loaned by the State on equal terms to students attending both pub-

lic and church-related elementary schools. *Board of Education v. Allen,* 392 U.S. 236 (1968). Since it had not been shown in *Allen* that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in *Everson,* the State was merely "extending the benefits of state laws to all citizens," *Id. at* 242. Just as *Bradfield* [*v. Roberts,* 175 U.S. 291 (1899)] dispels any notion that a religious person can never be in the State's pay for a secular purpose, [footnote omitted] *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. [*See Hunt v. McNair,* 413 U.S. 734, 743 (1973) ("the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends"). *See also Committee for Public Education v. Nyquist,* 413 U.S. 756, 775 (1973); *Tilton v. Richardson,* 403 U.S. 672, 679 (1971) (plurality opinion); *Lemon v. Kurtzman,* 403 U.S. 602, 664 (1971) (opinion of White, J.); *Board of Education v. Allen,* 392 U.S. at 244; *Everson v. Board of Education,* 330 U.S. at 17.] If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the

> State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike. The Court also has taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority. . . .

426 U.S. at 745-48 & nn. 12, 14 (footnotes included in brackets).

The City contends that the court should employ the analytical framework set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Supreme Court enunciated three "tests" for considering whether a government action is violative of the Establishment Clause.

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13 (citations omitted). Subsequent cases have acknowledged the *Lemon* tests to be a "helpful signpost" in assessing Establishment Clause challenges. *See Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Mueller v. Allen*, 463 U.S. 388, 394 (1983).[7]

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[7] In recent years, the *Lemon* test has been heavily criticized. The Court has considered modifying the test with Justice O'Con-

While mindful that non-secular motives might exist for the street closure, the first of the *Lemon* tests requires the court to determine whether the City had a *primarily secular purpose* for authorizing closure of the street. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Supreme Court analyzed whether a statute had been enacted for an "improper purpose" after a district court had granted summary judgment for plaintiffs based upon the wording of the statute and its legislative history. *Id.* at 594. The Court stated:

> A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency. . . . The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. . . . Moreover, in determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, . . . and the specific sequence of events leading to passage of the statute.

Id. at 594-95 (citations omitted).

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nor's "endorsement test," *see Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 594-97 (1989) (Blackmun, J., joined by Stevens and O'Connor, JJ.), or abandoning it altogether in favor of Justice Kennedy's "coercion test." *See County of Allegheny*, 492 U.S. at 535 (1989) (Kennedy, J., joined by Rehnquist, C.J. and Scalia and White, JJ., concurring in the judgment in part and dissenting in part); *Lee v. Weisman*, 505 U.S., ——, 112 S.Ct. 2649, 2678, 120 L.Ed.2d 467, 509 (1992) (Scalia, J., joined by Rehnquist, C.J. and White and Thomas, JJ., dissenting).

However, under either test, the Establishment Clause has not been violated in this case. The actions of the City in closing a portion of South Evergreen Street do not give the appearance that the City favors or endorses religion generally or the particular religious message of Idlewild Presbyterian Church; nor does the street closure tend to proselytize or coerce adherence to Presbyterianism or participation in religion in general.

Inasmuch as the resolution itself contains no statement whatsoever concerning the City Council's underlying reasons for authorizing closure of the street, the court must look to other sources for evidence of the City Council's motive. The primary evidence that sheds light on the City Council's motive is contained in the official records of the closing proposal and a verbatim transcript of the City Council meeting on December 12, 1989.

The record and the transcript reveal that Idlewild, in its presentation before the City Council, premised its petition on the need to prevent injury to children, the elderly and the handicapped when crossing South Evergreen to use the church facilities and its programs. *See* Transcript, at 4, 5, 5-6, 6-7 (comment of Reverend Strot, Roger Mannis, Wallace Bruce, and Karin Everett, respectively).

On the other hand, plaintiffs asserted that Idlewild's true purpose was to facilitate future church expansion and allow for construction of a canopy. *See Id.* at 15 (comments of John Sullivan). Furthermore, several witnesses contended that there must be less obtrusive measures available than the total closure of the street. *See Id.* at 13-17 (comments of Rose Hamling, Shelley Phillipy, and Susan West).

During the course of the hearing, the questions from the council members related to traffic and pedestrian safety, (*e.g., Id.* at 8-9 (Councilman Sammons); *Id.* at 10 (Councilman Whalum); *Id.* at 12 (Councilmen Wilbun and Allissandratos and Councilwoman McCormick); *Id.* at 13 (Councilman Edmonds)), as well as the impediment to traffic flow, (*e.g., Id.* at 9 (Councilwoman Sonnenburg)), fire safety, (*e.g., Id.* at 2 (Councilwoman Sonnenburg); *Id.* at 10-11 (Councilman Whalum)), and code compliance, (*e.g., Id.* at 8 (Councilman Sammons); *Id.* at 10-11 (Councilman Whalum)).

Upon submission to the council for a vote, only two council members out of thirteen members expressed any opinion concerning the merits of the petition. *See* transcript, at 18 (comments of Councilmen Whalum and Wilbun). The comments of each indicate that their primary purpose for the resolution was their support for the community-oriented outreach programs instituted by Idlewild. Councilman Wilbun also expressed concern for the safety of the participants of these programs. The measure was unanimously passed by the twelve council members present without any further discussion.

Plaintiffs contend that "[t]he purpose of the street closure remains the central issue to be determined . . . ." Plaintiffs' Reply Memorandum, filed October 15, 1990, at 9. The court agrees. Plaintiffs argue that the safety reasons asserted by Idlewild are " 'classic' pretextual reasons."

On this issue the court is left with a City Council resolution that is silent as to the purpose for its enactment; the petition, and a legislative history in the form of a verbatim transcript that evinces significant concern for pedestrian safety. Having studied the evidence, the court as fact finder concludes that a majority of the City Council were motivated by a primarily secular purpose in the determination to close Evergreen Street at its intersection with Monroe. That purpose was to provide greater safety to the numerous pedestrians crossing Evergreen. Therefore the court rejects the plaintiffs' claim that the action of the City Council violated First Amendment prohibitions.[8]

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[8] The court further concludes that the primary or principal effect of this resolution is not one that advances or inhibits religion, but simply the abandonment of the city's right to use a small piece of property as a city street. Likewise, it cannot be said that the resolution in any way fosters "an excessive government entanglement with religion."

III. Fifth and Fourteenth Amendment Claims

Plaintiffs next assert that the closure of the street extinguished plaintiffs' private easement and constituted a taking of property in violation of the Fifth Amendment's Taking Clause. That clause provides that shall not be "taken for public use, without just compensation." This requirement embodied in the Fifth Amendment is applicable only to federal government action. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). However, the underlying principle has been incorporated within the Due Process Clause of the Fourteenth Amendment and thereby made applicable to the states. *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1094-95 (6th Cir. 1978).

The City argues that this claim is premature because plaintiffs have an adequate remedy at state law for inverse condemnation under *Tenn. Code Ann.* § 29-16-123. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (holding that plaintiff's federal constitutional claim was not made ripe where plaintiff made no inverse condemnation claim under section 29-16-123 for taking as a result of zoning change). In *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater*, 372 S.W.2d 168 (Tenn. 1963), the Supreme Court of Tennessee held that section 29-16-123 was the exclusive remedy available to one whose private easement in a street was extinguished by a city's closure of that street.

If plaintiffs were seeking compensation, *Williamson County* would compel the court to find that this suit was premature. Here, however, the thrust of plaintiffs' argument is that the City's action in quitclaiming its interest in South Evergreen and authorizing the street's closure constituted an unlawful taking of plaintiffs' private easement for a *private* rather than a public use. Plaintiffs seek to enjoin this allegedly unconstitutional taking. This

issue is not premature and requires an examination of what constitutes a permissible "public use."

It is the universally established rule that private property can constitutionally be taken by eminent domain only for public use. The Supreme Court has long recognized this limitation upon the eminent domain power. "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' " *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (citations omitted). But, what constitutes a taking for "public use" is subject to interpretation. *See City of Knoxville v. Heth*, 210 S.W.2d 326, 328 ("[P]ublic use . . . is not capable of exact definition, but is elastic, in order to keep pace with changing conditions.").

In *Johnson City v. Cloninger*, 372 S.W.2d 281 (Tenn. 1963), the Tennessee Supreme Court stated:

> There are at least three general classes of eminent domain cases in which the use which will meet the "public use" criterion is measured by different standards depending on the character of the condemnor. (1) Condemnation by the State or municipality for a project which it will carry out and use or operate; (2) condemnation by a public service corporation which the State will regulate and which provides some necessity to the public; and (3) condemnation by or for the use of a private individual or corporation where such is necessary for the *public welfare*.

Id. at 284 (emphasis added). The *Johnson City* court thus recognized without discussion that condemnation by or for the use of a private entity might be permissible where it is necessary for the public welfare. In *City of Knoxville v. Heth*, 210 S.W.2d 326, 328 (Tenn. 1948), the court stated that the determination of whether or not a taking was for a "public use" was a judicial question.

However, a determination of what constitutes a "public use" which has been made "by the state or its agencies [is] entitled to great weight or respect by the courts." *Id.*

"The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority*, 467 U.S. at 240.

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one . . . . [D]eference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

Id. at 240-41 (citations omitted).

> When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.

Id. at 242-43.

Where such a street closure is within the municipiality's powers as delegated by the sovereign,[9] and determined to be for the health and welfare of the community, such

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[9] Plaintiffs do not dispute that the City is empowered under Section 452 of its Charter "to close by resolution any street or alley whenever, in the judgment of the board of commissioners, the closing of said street or alley shall be conducive to public welfare."

taking is for a public use. On the other hand, if the closure were made with the intent and primary purpose of aiding a private entity and not for the public welfare, it would exceed the sovereign's authority as an illegitimate purpose.

Here, as with the First Amendment claim, the primary issue before the court is whether the City Council's motive for the street closure was for public safety or to aid Idlewild as a private entity. The court has already determined that the primary purpose of the City Council in adopting the closure resolution was to further the public safety, specifically the safety of pedestrians who cross that segment of Evergreen. Given that the City Council's purpose was public safety and that it has decided that the public safety justifies this street closing, the court concludes that the closure does not violate the "public use" limitations on the City's right to condemn or take any easement that the plaintiffs may have across the closed segment of South Evergreen.

The plaintiffs' request for an injunction to prohibit the closure of the segment of South Evergreen from Monroe to Union is denied and this action is dismissed.[10]

IT IS SO ORDERED this 2nd day of November, 1993.

/s/ Jerome Turner
JEROME TURNER
United States District Judge

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[10] As noted earlier in this decision, Idlewild is not a party to this action. The court in no manner directly determines any dispute that the plaintiffs and Idlewild may have under Tennessee law concerning the right of Idlewild as quitclaim grantee to preclude the use of the private easement that the plaintiffs claim and the city concedes.